How Secure Are You--The Effects of Perfection and Non-Perfection under Article 9 of the Uniform Commercial Code

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Law Summary

How Secure Are You?
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I. INTRODUCTION

A wholesale revision to Article 9 of the Uniform Commercial Code has been proposed. Like current Article 9 (the "Code"), the proposed revision (the "Revision") "provides a comprehensive scheme for the regulation of security interests in personal property and fixtures." Although the Revision follows the general approach and retains much of the terminology of the Code, it significantly revises portions of the Code.

This Note has a very limited scope. It focuses solely on the choice-of-law provisions found in the Code at Section 9-103, and in the Revision at Sections R9-301 through R9-307. These sections deal with choice-of-law and the effects of perfection and non-perfection in multiple state transactions.

As discussed in detail below, the Code's approach to multi-state transactions leaves much to be desired. The Revision will significantly alter the approach taken for multi-state transactions. The Revision's approach is not only easier to understand, but it also provides significantly more certainty to the secured party that it has filed in the proper location and thereby perfected its security interest. The approach taken by the Revision is a vast improvement over the Code and should be embraced by the Missouri legislature, borrowers, lenders, and practitioners.

1. The Code's sponsors are the American Law Institute and the National Conference of Commissioners on Uniform State Laws.
5. For a discussion of the entire revision to Article 9, see WILLIAM H. HENNING, UNDERSTANDING SECURED TRANSACTIONS (2d ed. 1999). I would like to thank Professor Henning for greatly enhancing this Note through his comments and suggestions.
7. See U.C.C. §§ 9-301 to -307 (2000). All references to the Revision will be preceded by an "R" in an effort to enable the reader to readily distinguish between the current Code and the revised Code, e.g., U.C.C. § R9-301 (2000).
II. BACKGROUND

Code Section 9-103 provides a comprehensive and complicated set of rules about the proper place of perfection for a security interest. The drafters of the Code divided most goods into mobile and ordinary. Generally, under the Code, filing with respect to ordinary goods (and certain intangible rights represented by an indispensable writing) should be in the place where the goods are located, dictated by the "last-event" test. Filing with respect to mobile goods (and other intangible rights) should normally be in the state where the debtor is located. These categories have proved unhelpful in many circumstances, resulting in widespread dissatisfaction.

Code Section 9-103(1) covers documents, instruments, letters of credit, and ordinary goods. This section follows the basic rule that a secured party should perfect under the laws of the jurisdiction where the collateral is located. This section uses the last-event test to determine the location of the collateral and therefore the jurisdiction where the secured party must file. However, this basic rule is subject to some exceptions.

10. This Note does not discuss goods that are subject to a certificate of title law, or goods that are oil, gas, or minerals.
11. See Mo. Rev. Stat. § 400.9-103(3) (2000). Mobile goods are:
[Goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in subsection (2).
14. U.C.C. § 9-103(1) (2000). This category consists solely of tangible assets. Each is capable of being possessed, and therefore capable of being "located" in a particular place.
18. See Mo. Rev. Stat. § 400.9-103 (2000). The last-event rule does not apply, or is at least applied in a different manner, in applications involving goods that the parties understand will be moved to another state at the time of attachment, see Mo. Rev. Stat. § 400.9-108(1)(c) (2000); goods brought into, and intended to be kept, in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, see Mo. Rev. Stat. § 400.9-103(1)(d) (2000); goods covered by a certificate of title, see Mo. Rev. Stat. § 400.9-103(2)(b) (2000); accounts, general
Under the last-event test, codified in Missouri Revised Statutes Section 400.9-103(1)(b), perfection is determined by the law of the state where the collateral is physically located when the event occurs on which the assertion of the security being perfected or unperfected is based.23 "This event will frequently be the filing."21 If the last event is not filing, and perfection is through filing, the filing is required to be in the jurisdiction where the collateral is physically located when the last event occurs.22

The requirement that the filing occur in the jurisdiction where the collateral is physically located when the last event occurs creates uncertainty for the filer because the collateral is inherently capable of changing locations. For the secured party to be certain that it is properly perfected under the last-event test, it must be absolutely certain that it correctly evaluates the location of the collateral at the time the last event occurs. The comments to the Code indicate that the last event will frequently be the filing of the financing statement.23 However, the Code specifically provides for pre-filing.24 This filing obviously would not perfect a security interest because it would not yet exist. However, when the requirements for attachment are subsequently satisfied, the security interest will be perfected at the moment of attachment.25 At the moment of attachment, occurring at a possibly unknown point in the future, the secured party must be certain of the location of the collateral in order to be certain of its perfected status.

intangibles and mobile goods, see MO. REV. STAT. § 400.9-103(3)(b), (c), (e) (2000); chattel paper, see MO. REV. STAT. § 400.9-103(4) (2000); minerals, see MO. REV. STAT. § 400.9-103(5) (2000); and investment property, see MO. REV. STAT. § 400.9-103(6)(b)-(f) (2000).

19. Section 400.9-103(1)(b) states:
Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is located when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

MO. REV. STAT. § 400.9-103(1)(b) (2000).


24. See MO. REV. STAT. § 400.9-402(1) (2000). This allows the secured party to file its financing statement before it commits to making a loan. This provides the secured party with time to search the system for adverse filings while being protected from anyone filing between the time of the search and the time of the loan.

One of the exceptions to the last-event test is the thirty-day rule.\textsuperscript{26} This exception prevents a result that would require the secured party to have multiple filings in separate states.\textsuperscript{27} Under current law,\textsuperscript{28} when the transaction creates a purchase money security interest in goods that the parties understand will be moved to another state, and the parties have that understanding at the time the security interest attaches, application of the last-event test would result in the secured party having to double file.\textsuperscript{29} The thirty-day exception avoids this result. The thirty-day rule allows a secured party to file a financing statement in the destination jurisdiction; the law of the destination jurisdiction then governs the perfection and the effect of perfection or non-perfection of the security interest from the time it attaches until thirty days after the debtor receives possession of the goods. If the goods reach the destination jurisdiction before the end of the thirty-day period, the original perfection under the law of the destination jurisdiction continues.\textsuperscript{30} If, however, the goods are not transferred to the destination jurisdiction within the allotted thirty-day period, the law of the destination jurisdiction is irrelevant, and the last-event test dictates the choice-of-law.\textsuperscript{31} The comments to the Code suggest that "caution may dictate" that a secured party file in both jurisdictions to avoid "disappointment of expectations that the law of the destination jurisdiction will govern continuously."\textsuperscript{32}

\textsuperscript{26} See Mo. Rev. Stat. § 400.9-103(1)(c) (2000). The rule states: If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or non-perfection of the security interest from the time it attaches until thirty days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the thirty-day period. Mo. Rev. Stat. § 400.9-103(1)(c) (2000).

\textsuperscript{27} Note that this provision only applies to ordinary goods. See Mo. Rev. Stat. § 400.9-103(1) (2000).

\textsuperscript{28} See Mo. Rev. Stat. § 400.9-103 (2000).

\textsuperscript{29} Because the general rule for ordinary goods under Section 9-103 requires a filing in the jurisdiction where the collateral is physically located, the secured party would be required to file in the destination jurisdiction, because that is where the collateral is going to end up. The secured party will also have to file in the jurisdiction where the collateral is originating to avoid an unperfected status while the goods are in transport to the destination jurisdiction. The secured party’s filing in the jurisdiction of origin would have the effect of protecting the secured party’s interest while the goods enter other jurisdictions while in transit to their destination. Here the four-month rule, discussed below, will give effect to the filing in the state of origin; therefore, the secured party’s perfection is contingent upon filing in that state. See infra notes 35-47 and accompanying text.

\textsuperscript{30} See U.C.C. § 9-103 cmt. 3 (2000).

\textsuperscript{31} See U.C.C. § 9-103 cmt. 3 (2000).

\textsuperscript{32} U.C.C. § 9-103 cmt. 3 (2000).
Beyond the possibility of non-delivery within thirty days, other traps exist. One such trap comes into play if a purchase money seller enters into a contract for the sale of goods to be used in an undesignated location. If the parties do not understand at the time the security interest attaches\(^3\) that the goods are to be kept in a destination jurisdiction, the thirty-day rule will not benefit the secured party. If the secured party is not aware at the time the security interest attaches where the goods are going to be located, yet later learns and files in that destination jurisdiction, the filing in the destination jurisdiction is ineffective until the goods arrive there, and the last-event test will dictate that the secured party file in the state of origin to perfect its security interest.

As stated in the comments to the Code, if the secured party has any doubt about whether the thirty-day rule applies, or if there are any risks that the goods will be delayed more than thirty days before reaching the destination state, it should protect itself under the last-event test\(^4\) and the thirty-day rule.\(^5\) To gain this protection, the secured party would be required to file in both the jurisdiction of origin and the destination jurisdiction. The filing in the jurisdiction of origin will both provide protection while in that jurisdiction and assure availability of the four-month grace period provided by the four-month rule discussed below. The filing in the destination jurisdiction will provide the protection of the thirty-day rule, if applicable. Because of the weaknesses inherent in the Code, the dual-filing approach is the only way a secured party can be guaranteed maximum protection.

A second exception to the last-event test is the four-month rule.\(^6\) If ordinary goods are subject to a perfected security interest, the laws of the state in which that perfection occurred continue to govern for four months after the

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34. See U.C.C. § 9-103 cmt. 3 (2000).
35. See Mo. Rev. Stat. § 400.9-103(1)(d) (2000). The rule states:
When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by Part 3 of this article to perfect the security interest,
(i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;
(ii) if the action is taken before the expiration of the period specified in subparagraph (i), the security interest continues perfected thereafter;
(iii) for the purpose of priority over a buyer of consumer goods (subsection (2) of section 400.9-307), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in subparagraphs (i) and (ii).
time the goods are removed to another state. The secured party must, however, perfect under the laws of the new state in order to ensure continuous perfection. If the secured party invokes the laws of the new state before the end of the four-month period, its perfection continues seamlessly. Otherwise, it becomes unperfected at the expiration of the four-month period. Generally, to invoke the laws of the new state, the creditor must refile within four months of bringing the collateral into the new jurisdiction. When this action is taken, the perfection continues according to the law of the state in which the filing is made. If the continuation of perfection is not timely made, the perfection is lost as to a person who becomes a purchaser after the goods were removed to the second state.

The purpose of the four-month rule is to provide protection to third parties in the second state. However, it is still possible for a third party to suffer some harsh results. If a nonordinary-course buyer were to purchase ordinary goods that were subject to a security interest perfected by a filing in the original jurisdiction, and permanently removed from that jurisdiction one month earlier, the buyer would expect to be able to protect himself by searching the records of the jurisdiction in which the transaction occurs. However, when the nonordinary-course buyer searches these records he will not find any indication of the perfected security interest. If the secured party catches up to the collateral within three months and refiles in the new jurisdiction, it will prevail over the buyer. Although this outcome is a harsh result to the buyer, it is also not entirely favorable to the secured party. In order for the secured party to be certain of its protection, it must check on the location of the collateral at least every four months.

42. See U.C.C. § 9-103 cmt. 4(c) (2000). "If a vehicle is reregistered in another jurisdiction . . . a danger of deception to third parties arises." U.C.C. § 9-103 cmt. 4(c) (2000).
45. A cautious secured party may check more often. The sooner the secured party learns of a change in location and refiles in the new jurisdiction, the less likely a third
Along with the other provisions of Section 9-103, the four-month rule has resulted in disputes regarding its application.\textsuperscript{46} For example, the Code states that the four-month rule applies to collateral "brought into and kept in this state."\textsuperscript{47} This leaves an open question regarding collateral brought into another state for temporary purposes and kept beyond four months. The comments to the Code state that the language used in the Code implies "a stopping place of permanent nature in the state, not merely transit or storage intended to be transitory."\textsuperscript{48} The next major category of collateral considered by the drafters of the Code are "[a]ccounts, general intangibles and mobile goods."\textsuperscript{49} Because these types party has entered with whom the secured party may have to litigate priority issues.

47. MO. REV. STAT. § 400.9-103(1)(d) (2000).
49. MO. REV. STAT. § 400.9-103(3) (2000). This section states:
\begin{enumerate}[(a)]
\item This subsection applies to accounts (other than an account described in subsection (5) on minerals) and general intangibles (other than uncertificated securities) to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in subsection (2).
\item The law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest.
\item If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or non-perfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.
\item A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.
\item A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that
of collateral are either mobile, and likely to change location frequently, or purely intangible, and truly have no location, the Code adopts a rule that is predicated on the location of the debtor rather than the location of the collateral.\textsuperscript{50}

The definition the Code provides for mobile goods is long, complex, and has led to problems.\textsuperscript{51} Goods as defined by the Code, include “all things which are movable at the time the security interest attaches.”\textsuperscript{52} Therefore, mobile logically indicates something more than movable.\textsuperscript{53} The definition also requires the goods to be “equipment or ... inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in subsection (2).”\textsuperscript{54} The Code further requires that the goods be of a type normally used in multiple states,\textsuperscript{55} and this is determined based on how the goods would normally be used, not on the debtor’s actual use of the goods. All of these requirements are subject to differing interpretations and therefore prompt disputes regarding Section 9-103’s applicability.\textsuperscript{56}

The secured party’s required filing in the state where the debtor is located\textsuperscript{57} presents problems when a debtor has ties to more than one state. The Code states that “a debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence.”\textsuperscript{58} This language leaves an open question as to the appropriate location in which to file.

If, post perfection, the debtor changes location, it will present a problem similar to that of the secured party who perfects its interest in collateral that is later moved to another state. The analysis here is the same when a creditor is faced with interstate movement of collateral it has perfected an interest in. The Code provides that a security interest that is perfected in the location of the debtor is perfected until the expiration of four months after a change in the

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\begin{itemize}
  \item period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.
  \item Mo. Rev. Stat. § 400.9-103(3) (2000).
  \item 50. Due to the mobile nature of the goods as a practical matter, a secured party would be required to file everywhere if the Code followed a rule requiring the filing to be in the jurisdiction where the collateral is located.
  \item 53. The definition of normal goods enumerates mobility; therefore, mobile goods must imply something more than just mobile in the sense of movability. \textit{See} U.C.C. § 9-105(1)(h) (2000).
  \item 56. \textit{See generally} UCC Case Dig ¶ 9103.5 (1998).
\end{itemize}
debtor's location, or until the original perfection would have run out, whichever comes first. 59

As discussed above, the Revision attempts to remedy the ambiguities of the Code. The next section is devoted to exploring the proposed sections of Revised Article 9 60 that will replace current Section 9-103.

III. RECENT DEVELOPMENTS

Because of technological advances, as well as a general dissatisfaction with many sections of the Uniform Commercial Code Article 9, a major revision to Article 9 has been proposed and adopted in several states. 61 Revised Article 9 (the "Revision") has a delayed effective date of July 1, 2001. 62 A portion of this revision 63 will replace the Code’s choice-of-law provisions discussed in Part II of this Note.

A. Choice-of-Law and Debtor Location

The Revision distinguishes between possessory and nonpossessory interests in determining choice-of-law provisions. The general rule 64 of the Revision is that perfection of nonpossessory security interests is governed by the local law of the jurisdiction in which the debtor is located. 65 The Revision provides more detailed guidelines than the Code for determining where a debtor is located. 66 The Revision also provides that perfection of possessory security interests is governed by the local law of the jurisdiction in which the collateral is located. 67

Section R9-301(1) substantially simplifies the choice-of-law rules 68 by reducing the number of filing offices in which secured parties must file or


60. As was mentioned earlier, all references to the proposed revision will be cited with an "R" preceding the section number, e.g., U.C.C. § R9-301 (2000).


62. See SELECTED COMMERCIAL STATUTES 1018 (West 2000).


64. The general rule is subject to several exceptions. See generally U.C.C. § R9-301 cmt. 5 (2000).

65. The Uniform Commercial Code states that "the law governing perfection of security interests in both tangible and intangible collateral, whether perfected by filing or automatically, is the law of the jurisdiction of the debtor’s location, as determined under Section 9-307." U.C.C. § R9-301(1) cmt. 4 (2000).


search. The law of a single jurisdiction governs perfection with respect to most types of collateral, both tangible and intangible. This result is achieved through the Revision’s elimination of the last-event test and implementation of the debtor location approach.

One reason that the debtor’s location was chosen as the general location for perfecting a security interest in most types of collateral was to minimize the number of cases in which the governing law would change after a financing statement had been properly filed. The logic is that debtors will change their location less frequently than the location of collateral will change. This will also reduce the number of filing offices in which secured parties must file or search when collateral is located in several jurisdictions. To further reduce this number, the rules for intrastate filing are simplified. The Revision adopts a general rule for central filing with some exceptions for real-estate related collateral.

Rules for determining the location of the debtor are located in Section R9-307. This Section provides several baseline rules for determining the location of the debtor. For example, an individual is located at his or her residence. An organizational debtor, other than a registered organization, is located at its place of business, and, if it has more than one place of business, at its chief executive office. A registered organization is located in the state under whose laws it is organized and continues to be located in that jurisdiction even though its status as a registered organization is suspended, revoked, forfeited, lapsed, or dissolved.

These new rules for determining the location of the debtor are a vast improvement over the Code’s use of the chief executive office test. Although

78. The Uniform Commercial Code defines a “registered organization” as “an organization organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized.” U.C.C. § R9-102(a)(70) (2000).
81. The term “chief executive office” is not defined in this Section or elsewhere in the Uniform Commercial Code. “Chief executive office” means the place from where the debtor manages the main part of its business operations or other affairs. This is the
the chief executive office test is retained by the Revision, it only applies to a small portion of debtors.82 The official comments to the Revision provide guidance for determining where a chief executive office is located that, if followed by the courts, should drastically reduce doubts as to the location of the debtor.83 "Even when a doubt arises, it would be rare that there could be more than two possibilities. A secured party in such a case may protect itself by perfecting under the law of each possible jurisdiction."84

The Revision also provides rules for determining the location of foreign debtors.85 The general location of debtor rules apply only if a debtor’s residence, place of business, or chief executive office is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made available in a filing, recording, or registration system as a condition or result of the security interest’s obtaining priority over the rights of a lien creditor with respect to the collateral.86 For the laws of a foreign jurisdiction to apply, the foreign jurisdiction must provide a system that will enable the secured party to put the public on notice of its security interests.87 When foreign law affords no public notice of security interests, the general rule yields unacceptable results.88 Accordingly, in such cases the Revision establishes the debtor’s location as Washington, D.C.89

B. Debtor Relocation

The Revision’s general rule regarding debtor relocation83 basically tracks the Code.91 Generally, if the security interest is properly perfected92 under the law of the jurisdiction in which the debtor is located, the security interest will remain perfected for a limited grace period following relocation.93 The length

place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. With respect to most multi-state debtors, it will be simple to determine which of the debtor’s offices is the “chief executive office.” U.C.C. § R9-307 cmt. 2 (2000).

82. The test applies only to organizations that are not incorporated and that have locations in more than one state. See U.C.C. § R9-307(b) (2000).
86. See U.C.C. § R9-307(c) (2000).
of the grace period varies and will end if (1) perfection in the original jurisdiction ceases, as by lapse of the financing statement;\footnote{94} (2) four months have passed since the debtor’s change of location to a new jurisdiction;\footnote{95} or (3) one year has passed since a transfer of collateral to a person who thereby becomes a debtor and is located in another jurisdiction.\footnote{96} This flexible grace period provides secured parties with a period of time in which its prior perfection remains valid and provides time for re-perfection (typically by filing) under the law of the new jurisdiction.\footnote{97} If the secured party is able to re-perfect within the grace period, it will remain continuously perfected.\footnote{98} If the security interest does not become perfected in the new jurisdiction before the grace period expires, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.\footnote{99}

The Revision’s general rule with respect to possessory security interests in goods, instruments, negotiable documents, money, or tangible chattel paper\footnote{100} is that the governing law is the law of the jurisdiction in which the collateral is located.\footnote{101} This is the rule of current Section 9-103(1)(b), with one important exception; the Revision eliminates the troublesome last-event test.\footnote{102}

The Revision also provides that with respect to the effect of perfection or non-perfection and the priority of a nonpossessory security interest, the law of the jurisdiction where the collateral is located governs for collateral consisting of goods and indispensable paper.\footnote{103} As discussed in Part III.A, the general rule provides that perfection of these security interests in these types of collateral is the local law of the jurisdiction in which the debtor is located.\footnote{104} This illustrates the Revision’s bifurcated approach. In general, the Revision continues the approach of the Code in that the law of a single jurisdiction governs both questions of perfection and priority; in some cases this rule may still be complicated.\footnote{105} The official comments to the Revision offer this example:

\[\text{[A]ssume a security interest in equipment located in Pennsylvania is perfected by filing in Illinois, where the debtor is located. If the law}\]

98. See U.C.C. § R-316(b) (2000).
100. These are the only types of collateral capable of being perfected by possession. Assets other than goods are sometimes referred to as indispensable paper.
of the jurisdiction in which the debtor is located were to govern priority, then the priority of an execution lien on goods located in Pennsylvania would be governed by rules enacted by the Illinois legislature.106

To address this problem, the Revision "divorces questions of perfection from questions of 'the effect of perfection or non-perfection and the priority of security interest.'"107 The Revision's comments state that "the rights of competing claimants to tangible collateral are resolved by reference to the law of the jurisdiction where the collateral is located."108 Although this bifurcated process may result in more complexity, such a process retains the benefits of the debtor location rule while avoiding problems that may arise if distant jurisdictions were allowed to control issues related to priorities.

IV. DISCUSSION

The revised sections of Article 9, if adopted by the Missouri legislature, undoubtedly would reduce the risk of errors when determining where to file and where to search in multi-state transactions. The Code has proven to be problematic.109 By eliminating the last-event test and the distinction between mobile and ordinary goods, the Revision attempts to simplify multi-state transactions.110

The Revision chooses the location of the debtor as the proper place to perfect in the vast majority of circumstances.111 The location of the debtor rule in Section R9-301(1) would effectively eliminate the last-event test. The last-event test has proven to be a cumbersome tool for determining the proper location for filing.112 The Revision offers to replace this test with a simple distinction between possessory and nonpossessory interests.113 It is logical to have an exception to the general rule of perfecting in the state where the debtor is located when the secured party is in possession of the collateral. If the secured party has possession and control of the collateral, and the collateral were to be removed from the jurisdiction where it is currently located (proper location for perfection), the secured party would clearly be aware of this removal and

110. An illustration of the beneficial effects that the Revision offers is discussed below. See infra text accompanying notes 126-38.
therefore have an opportunity to reperfect in the new jurisdiction. The new case with which secured parties can determine where to perfect, and prospective secured parties can determine where to search, will result in smoother transactions at lower costs. Further, the Revision is consistent with the Uniform Commercial Code’s general goal of promoting business transactions.

The Code provides that the law governing accounts, general intangibles, and mobile goods is the law of the jurisdiction where the debtor is located.114 In the Revision, the location of the debtor rule is the residual rule.115 The major differences between the Code and the Revision become obvious when a secured party attempts to determine where a debtor is located. The example provided below illustrates this simplification in determining the location of the debtor.

Another major feature of the Revision’s approach to choice-of-law is the elimination of the distinction between mobile and ordinary goods.116 This distinction has created problems for secured parties attempting to determine where to perfect.117 The long and complex definition of a mobile good provided in the Code leads to indefiniteness and a general lack of understanding.118 A good that is literally mobile is not necessarily a mobile good under the Code’s definition; rather the drafters required that the goods be “of a type normally used in more than one jurisdiction, . . . .”119 This requirement applies regardless of the actual use to which the goods are put; if the goods are of the type that would generally be used in more than one jurisdiction, they are considered mobile under the Code.120 This distinction is often difficult to make, and thereby forces the careful creditor to submit multiple filings in an effort to ensure perfection.

By eliminating the distinction between mobile and ordinary goods, the Revision reduces the risk of excessive filings caused by secured parties making judgment calls as to the proper location to file.121 Moreover, because the Revision distinguishes between possessor interests and nonpossessor interests, and the location of the debtor is the general location for perfecting interests, the judgment calls and hesitant filings that secured parties are forced to make under the Code will cease to exist under the Revision.

121. See generally U.C.C. R9.
Critics of Revised Article 9 note the possibility that one jurisdiction could conceivably govern perfection while a separate jurisdiction could govern priority rules. Other critics of the Revision have argued that choice-of-law rules are not easily stated or understood and are difficult to discern. Yet, there appears to be a consensus, even among the critics, that, overall, the Revision is a substantial improvement over the Code. The Revision will make transactions quicker, simpler, and more cost effective.

There is much to be gained by adopting the Revision prior to July 1, 2001. If the Missouri legislature does not adopt the Revision, it will leave Missourians in the difficult position of trying to determine what law applies. With the broad and mobile nature of business conducted in the world today, it is not uncommon for collateral to relocate and for companies to conduct business in several states. Unless the creditor is absolutely certain what jurisdiction’s law will govern any given conflict, it will be forced to draft and comport to both the Code and the Revision. The more precise rules of the Revision will allow secured parties to determine, with confidence, where to perfect.

An example of a common transaction best demonstrates the numerous advantages the Revision has to offer Missourians.

Assume Debtor incorporates in Delaware. Debtor has decentralized management with major management divisions in several different states. Debtor’s business records are located in Illinois, his top management offices are in Missouri, business meetings are conducted in sunny Florida, and payroll operations are based in New York. Further, assume Debtor conducts business in all fifty states and the collateral is located in various offices in all fifty states.

For a secured party to be certain of its perfection in this example, it would encounter very high transaction costs under the Code. Specifically, to perfect its interest in the collateral if the goods are ordinary, the secured party must perfect in the jurisdiction where the goods are located. If the goods are classified as mobile, the secured party must perfect in the jurisdiction where the debtor is located. As discussed above, determining if goods are mobile or ordinary is

124. Id. at 1100-01.
125. If a creditor is uncertain what jurisdiction’s law will govern, then it is possible that would be a jurisdiction that has adopted the Revision. If this is so the Creditor will need to comport to Revision requirements, even though he may be located in a Code jurisdiction, to be protected.
126. See supra notes 11-17 and accompanying text.
the first step and also presents the first problem. If the secured party is able to confidently classify the collateral it can then begin filing.

Under the Code, if the goods in our example are considered ordinary, the secured party must determine where the goods are located. Here, the collateral is spread throughout the organization and located in all fifty states. Therefore, the secured party must file in all jurisdictions. If the collateral were ordinary, the secured party would be faced with the last-event test analysis to determine where the filing should occur.\(^ {127} \) The previous discussion of this test illustrates its inherent problems.

If the collateral in our example is determined to be mobile, the secured party will be required to file in the jurisdiction where the debtor is located.\(^ {128} \) This approach also presents problems. The location of the debtor rules in the Code\(^ {129} \) provide that “[a] debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence.”\(^ {130} \) In our example the debtor has more than one place of business, thereby placing its location at its chief executive office. The comments to the Code state that the chief executive office “does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of his business operations.”\(^ {131} \) From that definition we can eliminate Delaware\(^ {132} \) as a jurisdiction where the debtor must file; however, beyond that, the secured party must file in the four remaining states to be certain of perfection.\(^ {133} \) The comments to the Code endorse this result.\(^ {134} \)

After determining the location of the debtor or location of the collateral, whichever is applicable, the secured party must then determine where to file within the jurisdiction. Section 9-401 of the Code provides three alternative approaches to determine the proper place to file within a state.\(^ {135} \) The first


\(^ {131} \) U.C.C. § 9-103 cmt. 5(c) (2000).

\(^ {132} \) The business was incorporated in Delaware; however, there is no mention of any business occurring within that jurisdiction.

\(^ {133} \) For the discussion of Section 9-401, see infra notes 135-38.

\(^ {134} \) Section 9-103 comment 5(c) states: “Doubt may arise as to which is the ‘chief executive office’ of a multi-state enterprise, . . . . A secured party in such a case may easily protect himself at no great additional burden by filing in each possible place.” U.C.C. § 9-103 cmt. 5(c) (2000).

\(^ {135} \) Section 400.9-401 of the Missouri Revised Statutes states:

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts, or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the recorder of deeds in the county of the debtor’s residence or if the debtor is not
alternative provides for filing in the Secretary of State's office with the exception of some land-related interests.\textsuperscript{136} The second alternative provides for filing in the Secretary of State's office with several additional exceptions.\textsuperscript{137} The third alternative requires that anything the secured party must file in the Secretary of State's office must also be filed in the county of the debtor's business if the debtor only transacts business in one county.\textsuperscript{138} If the debtor is obviously in business in multiple counties, the secured party will only be required to file with the Secretary of State. However, if there is doubt, the secured party must file in

a resident of this state then in the office of the recorder of deeds in the county where the goods are kept, and in addition when the collateral is crops growing or to be grown in the office of the recorder of deeds in the county where the land is located;

(b) when the collateral is timber to be cut, minerals or the like (including oil and gas) or accounts subject to subsection (5) of section 400.9-103, or when the financing statement is filed as a fixture filing (section 400.9-313) and the collateral is goods which are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed for record, and any such filing shall be for record;

(c) in all other cases, in the office of the secretary of state and in addition, if the debtor has a place of business in only one county of this state, also in the office of the recorder of deeds of such county, or, if the debtor has no place of business in this state, but resides in the state, also in the office of the recorder of deeds of the county in which he resides.

(2) A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

(3) A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.

(4) The rules stated in section 400.9-103 determine whether filing is necessary in this state.

(5) Notwithstanding the preceding subsections, and subject to subsection (3) of section 400.9-302, the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the secretary of state. This filing constitutes a fixture filing (section 400.9-313) as to the collateral described therein which is or is to become a fixture.

(6) For the purposes of this section, the residence of an organization is its place of business, if it has one, or its chief executive office if it has more than one place of business.


all counties as well as in the Secretary of State’s office. This could lead to a tremendous number of filings in this example.

This example illustrates that, under the Code, a secured party faces many risks. The secured party is forced to determine if the goods are mobile or ordinary. Depending on the result, the secured party must then determine where the goods are located or where the debtor is located—both questions present multiple possibilities and inherent uncertainty. Once the appropriate location(s) for the filing are determined, the secured party then must determine where, within that jurisdiction, it should file.

The requirements under the Revision are a substantial improvement over the Code for our hypothetical Debtor. Section 9-307 of the Revision provides rules for determining the location of a debtor.139 This Section has a provision specifically for registered organizations as well.140 A registered organization is defined by the Revision as “an organization organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized.”141 There is no doubt that the corporation in this example is considered a registered organization by the Revision. Therefore, the entire analysis for the secured party is eliminated and the secured party may confidently file in the Secretary of State’s office in the state of incorporation—in this example, Delaware.

The above example is by no means extraordinary. The hypothetical Debtor in this example is representative of many debtors in today’s complex business world. It becomes obvious through the example that the Revision is a significant improvement over the current Code and should be adopted by the Missouri legislature.

V. CONCLUSION

While this Note has a limited focus, it is illustrative of the entire Article 9 Revision. A decision by the Missouri legislature to retain the current version of

139. Section R9-307(b) states:
[Debtor’s location: general rules.] Except as otherwise provided in this section, the following rules determine a debtor’s location:
(1) A debtor who is an individual is located at the individual’s principal residence.
(2) A debtor that is an organization and has only one place of business is located at its place of business.
(3) A debtor that is an organization and has more than one place of business is located at its chief executive office.
140. Section R9-307(e) states: “A registered organization that is organized under the law of a State is located in that State.” U.C.C. § R9-307(e) (2000).
Article 9 will no doubt have an adverse effect on the citizens of Missouri. Missouri will lag behind the cutting edge of modern transactions. If Missouri legislators choose to adopt the Revision to Article 9, Missouri will fall into place with the rest of the country. With the adoption of the Revision, the increasingly complex transactions of today’s business world will be approachable and the amazingly complex rules regarding multi-state transactions under the current Code will be eliminated. There is no doubt that adoption of the proposed Revision is a great step in the right direction for Missouri.

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